IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN M. WILSON, WILLIAM M. BLACK, HENRY V. BOYNTON, SAMUEL P. LANGLEY, AND R. ROSS PERRY, CONSTITUTING AND COMPOSING THE COMMISSION TO SELECT THE LAND FOR ROCK CREEK PARK, APPELLANTS,

vs.

AVARILLA LAMBERT AND MARTINA CARR, SOLE SURVIVING CHILDREN AND HEIRS-AT-LAW OF JOHN VAN RISWICK, DECEASED, APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT.

Rock Creek park was established pursuant to the provisions of the act of Congress entitled "An act authorizing the establishing of a public park within the District of Columbia," approved September 27, 1890 (26 St., 492). The act consists of seven sections. The first provides for the acquisition by the United States of a certain tract or tracts of land, within certain specified limits, extending along both sides of Rock creek, in the District of Columbia, to be " perpetually

dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek park," with the proviso that the whole tract to be acquired should not exceed 2,000 acres nor the total cost thereof the sum of $1,200,000, which sum is thereby appropriated and directed to be paid for the land and for the incidental expenses of its acquisition. The second, third, fourth, and fifth sections prescribe the method of acquiring the land, and were enacted in the exercise of the right of the eminent domain. The sixth section, which is cited, substantially, in the majority opinion of the Court of Appeals, at pages 41 and 42 of the printed Record, exhibits the exercise of a co-ordinate right of sovereignty—*i. e.*, the right of taxation.

It is the sixth section of the act which is submitted to the consideration of the Court on this appeal.

The case of Shoemaker *vs.* The United States, decided in January, 1893, and reported 147 U. S., 282, presented for adjudication, first, the validity of the first five sections of the act, and, secondly, the correctness of certain rulings by the supreme court of the District of Columbia in the course of condemnation proceedings instituted in pursuance of the special jurisdiction conferred upon that court by the third of those sections. The bills of exception in that case in nowise involved adjudication of the assessment feature of the act. It is true that in the argument of the case attention was invited to the purpose disclosed in the sixth section to visit upon the individual property-owners within a limited geographical area the possible entire cost of a public work whose national scope was indicated by its perpetual dedication to the use and enjoyment of the people of the United States with a view to enforce the constitutional objections raised by the record to the preceding five sections of the act. But it was with this view solely that such reference was made and not with any purpose to deny the right of the legislature to assess local benefits in aid of a public local

improvement the direct and immediate effect of which is to confer benefits upon the property assessed. The distinction between such an improvement so specially and directly benefiting the subject of assessment and the national and unsolicited park here provided for was deemed to be obvious. The act is unique and admits of no intendment that the purpose of Congress was the establishing of a public local work in the commonly recognized sense of the term, such as a highway, street, sewer, canal, railroad, bridge, or even a city park; but, on the contrary, *ex vi termini*, a work of national scope, on a national scale, at a national cost, and in the sense of a United States court-house, arsenal, navy yard, post-office, library, and the like. It is therefore respectfully submitted that the observation of the court upon the assessment feature of the act, in the course of the opinion in the Shoemaker case, was broader than the bills of exception warranted and should not be considered as applying to the essentially distinct and distinguishable issues presented on this appeal.

The managing or park commission, created by the second section of the act, are the appellants here. Prior to the decision of Shoemaker's case their proceedings for the condemnation of lands taken had been characterized by the following steps:

April 16, 1891, they filed the map of location, embracing eighty-four (84) distinct parcels of land.

Failing in their negotiations for the purchase of more than five of these eighty-four parcels, and the time for negotiating having expired, on the 20th of May, 1891, they petitioned the supreme court of the District of Columbia for the appointment of three appraisers to assess the values of all the parcels of land embraced within the map of location.

The court, thereupon, in the exercise of the special jurisdiction which had been conferred upon it in that behalf by the third section of the act, appointed the appraisers, as prayed for by the park commission. December 19, 1891,

the appraisers, having completed their inquiry, reported to the court, in detail, their assessment of the value of each separate parcel of land included within the map of location.

This report was thereafterwards duly confirmed by the court.

The commission, finding that the aggregate of the assessed values of lands taken, as reported by the appraisers, together with the expense of condemnation, exceeded the limitation of $1,200,000 prescribed by the act as the total cost of the park, submitted, for the approval of the President, a modification of the area exhibited by the map of location corresponding in value with the total cost as limited by the act. The modification of their work was approved by the President on the 13th day of April, 1892.

It is here observable that at this date—the 13th of April, 1892—the commission had definitely and conclusively ascertained the cost of the land, including expenses. It was at this point in their procedure that the mandate contained in the first clause of the sixth section imperatively applied. The mandate is as follows:

"That the commission, having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expense upon the lands, lots and blocks situated in the District of Columbia, specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefit resulting to such real estate."

If, in a word, the assessment which the sixth section enjoins upon the commission to make was ever practicable and capable of being imposed by reason of resulting benefits to outlying lands from the location and improvement of the park or from its location alone, *then* and *then only* was, assuredly, the time for its legitimate levy, and if the commission declined, as they did, then and there, to make it are we not abundantly justified in claiming that their refusal to do so was equivalent to a tacit admission, aye, to

an open declaration, that no benefits had, in fact, resulted from either the location or the improvement of the park which could be made the object of assessment upon such outlying land?

That the commission did, at that time, decline to make such assessment is shown by their petition to the court on the 19th day of April, 1892, wherein they submit the President's approval of their plan of modified area, and, after referring to the failure of land-owners to call for the payment of the assessed values of their respective parcels of land, pray for an order directing payment, into the registry of the court, of such assessed values out of the only fund available for the purpose—*i. e.*, the $1,200,000 appropriated by the concluding clauses of the sixth section. This the court did, accordingly, on the 24th day of May, 1892. The commission thereafterwards applied for and obtained a rule upon the respondent land-owners requiring them to show cause why the title to the several parcels of land taken should not vest in the United States, and on the 19th day of the same month a special auditor was appointed by the court "to ascertain and report to the court the names of the parties respectively entitled to the appraised values of the tracts of land selected for the park."

At this point Mr. Louis P. Shoemaker, one of the respondents, applied for and was allowed his writ of error, and the record, thereupon presented, formed the basis of the court's affirmative decision of the 16th day of January, 1893.

Thereupon the work of paying the several owners of the parcels of land taken for the park proceeded without other interruption than the delay incident to the examination, by the special auditor, of the integrity of their respective claims until every parcel so taken, without exception, had been paid for in full. This was finally accomplished not later than the month of ——, 1893. From that time the title of the United States to the land within the Rock Creek park, as finally delineated, was conclusively established, as pre-

Title vested in U. S. by decree July 1892

scribed by the fourth section of the act, and the land itself fully paid for out of the $1,200,000 appropriated by the sixth. Further than that, pursuant to the additional requirement of the act in its sixth section, all taxable lands within the District of Columbia have from that date contributed their ratable quota, through the medium of general taxation, to the reimbursement to the Treasury of the United States of one-half of the entire sum of money thus paid for the acquisition of the park, including the attendant expenses, in four annual installments, with interest at the rate of 3 per centum per annum.

In the meantime—and the fact is necessarily conceded—the park has remained in precisely the same condition that it was in at the date of its location. It has undergone no physical change, and the legal change involved in the transfer of title to the United States will hardly be seriously urged as a rational basis for benefit assessment. It is, likewise, an admitted fact that, with the full and entire payment of the cost of the land taken and purchased for the Rock Creek park, and with the discharge and satisfaction of the expense incident thereto, the Rock Creek park was finally and definitely established, and that, with the establishing of the park, it passed by operation of law, as expressed in the seventh section of said act of Congress, under the permanent and joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, to the exclusion of the appellants. (R., pp. 6, 35.)

This formal transfer of the park by the appellants as a managing commission, by creation of the third section of the park act, to the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army as a board of permanent control, by designation in the seventh section of the act, took place on the 1st day of January, 1895, or about eighteen months after the lands selected for the park had been fully paid for and the park

itself finally and conclusively established and the title thereto vested in the United States.

When, therefore, the managing commission, on the 5th of January, 1895, set about the work of assessing, not only had the time elapsed for making a valid assessment, but the commission, by surrendering their functions, had disqualified themselves for making it. In other words, they were *functi officiis.*

Notwithstanding the above-recited facts, the appellants, on the 5th of January, 1895, in conformity with previous public advertisement, convened, for the first time, as a board of special assessors, claiming that, under the park act, they had ascertained the cost of the land taken for and now constituting the Rock Creek park, including the expenses of acquiring the said land, and that, acting under the authority of said act, they proposed to assess "such portion of such cost and expenses upon the lands, lots, and blocks, being real estate situated in the said District of Columbia specially benefited by reason of the location and improvement of said Rock Creek park," etc., as appears by the advertisement of said meeting at page 7 of the printed Record.

At this meeting the appellees, by their counsel, filed their formal protest against any proceedings whatsoever looking to the proposed assessment as for benefits. This paper appears at page 19 of the printed Record.

The meeting was subsequently adjourned for the purpose, as announced by the chairman, of taking the opinion of the Attorney General upon the question of the powers and legal right of the commission to proceed in the premises.

The Attorney General, however, declined to advise the appellants on the subject of their legal duties, whereupon they met again on the 19th day of January, 1895, with the avowed purpose of proceeding to assess in accordance with their previous advertisement.

Thereupon, on the same day, the appellees, who own in common the land designated on the recorded map of loca-

tion as parcel No. 16 (which was subsequently released from the proceedings in condemnation), by their counsel, filed their original bill for injunction, which appears at pages 2–17 of the Record.

To this bill a general demurrer was interposed February 5, 1895.

The court below, being of the opinion that the application for preventive relief was premature, by its order passed February 18, 1895, sustained the demurrer "with leave, however, to the complainants to renew their application at a later stage in the proceedings of the defendants, as such commission, by supplemental or other pleadings, as the complainants may be advised, for which purpose jurisdiction is retained by the court of the cause." (R., pp. 18, 19.)

Thereafterwards, on the 27th day of February, 1895, the complainants filed their supplemental bill, wherein they renew the allegations of the original bill, incorporate the same, and aver that since the order of the court above referred to the defendants have proceeded to assess, as for benefits resulting from the location and improvement of the park, and, for that purpose, have met, publicly, from time to time and procured the attendance of persons whose opinions, unsanctioned by oath, they have caused to be reduced to writing, and that at the last preceding meeting, held on the 21st day of February, 1895, they "formally announced that they deemed the aforesaid parcel of land numbered 16, among other lands within a radius of one-quarter of a mile from the park, to be specially benefited by reason of the location of the park, and that it was their determinate purpose to assess said parcel in the proportion and to the extent that they deemed the same to be so specially benefited," in evidence whereof they then and there caused the minute to be made in writing, which appears annexed to said supplemental bill as Exhibit "A" at page 21 of the Record, and that unless restrained from so doing the defendants would forthwith proceed to levy and collect the proposed assessment upon

the aforesaid parcel of land, as for alleged benefits resulting thereto from the location of said Rock Creek park, whereby, since the complainants are wholly without remedy at law, the title to their said real estate will be inevitably clouded, they will suffer irreparable injury in respect to their ownership of said parcel of land, and they will be subjected to a multiplicity of suits by reason of the levy and attempted enforcement of said assessment, and they renew their prayer that the defendants may be enjoined *pendente lite* and perpetually thereafter from levying and collecting such assessment.

Upon this bill the restraining order at page 25 was issued, and upon the hearing, therein provided, the defendants were restrained as prayed, *pendente lite*, by the order which appears upon the same page of the Record, made pursuant to the court's opinion, which, being subsequently reduced to writing, was filed April 16, 1895, and is to be found at page 26 of the Record.

In order to facilitate the answer of defendants and to relieve the legal issues involved from embarrassment, certain averments of fact which counsel deemed immaterial were elided from the supplemental bill by amendment filed March 16, 1895. (R., p. 26.)

The answer to the original and supplemental bills was filed July 24, 1895 (R., pp. 33–36). No material issue of fact is thereby raised save possibly touching the averments in the original bill that no benefits have actually resulted to complainants' land from the establishment of the park, and that no legal *criteria* now exist for the making of assessments.

"They (the defendants) admit that having ascertained the cost of the land taken for said park, including expenses, they have, in the performance of their said duty, and with a view to the assessment of such special benefits in accordance with the requirements of said act of Congress, taken the further steps set forth in said supple-

mental bill, and that, in the performance of the said duty and in the exercise of the power conferred upon them by said act of Congress, they did find and determine that no land within the District of Columbia situated more than one-quarter of a mile in any direction beyond the nearest park limit had been specially benefited by reason of the location and improvement of the park, and that they did further find and determine that a portion of said tract sixteen (16) had been so benefited by the location and improvement of the park, not only by reason of its proximity thereto, but because of its overlook of the said park; and they admit that said Exhibit 'A' to said supplemental bill is a correct extract from the minutes of the proceedings of these defendants; and they further admit that unless finally restrained by the order and decree of this honorable court they will further proceed in ascertaining and determining what lands, within the said quarter-mile limit, have been so specially benefited and make assessments thereon agreeably to the said act of Congress."

The answer is coupled with a demurrer to paragraphs 11 and 12 of the original bill "and to so much of paragraphs 14 and 15 thereof as is not above answered and to such portions generally of the said supplemental bill and original bill as are not above answered."

The replication was filed simultaneously with the answer (R., p. 36), and the cause being set for hearing at the same time, and subsequently submitted upon the pleadings without further argument, the court below passed its final decree perpetuating the injunction on the 30th day of September, 1895 (R., pp. 37, 38), from which the appellants appealed.

The cause having been assigned for hearing by the Court of Appeals as for the 17th of February, 1896 (R., p. 39), was, after full argument submitted for the decree of that court. (R., pp. 39, 40.)

Thereupon a majority of the court, consisting of Mr. Justice Morris and Mr. Justice Shepard, united to affirm the decree of Mr. Justice Cox at special term in an opinion the text of which appears at pages 40-55 of the Record.

The dissenting opinion of Mr. Chief Justice Alvey appears at pp. 55–56 of the Record.

From the final decree (R., p. 60), which was rendered in conformity with the opinion of the court, the appellants then and there appealed.

POINTS AND AUTHORITIES.

Jurisdiction.

Reference to the proceedings of the appellants, sitting as a board of assessors, embodied in Exhibit "A," annexed to the supplemental bill (R., p. 21), would seem to preclude the assumption that the jurisdiction of the lower court will be seriously questioned by them at the hearing of this cause. In the absence of their brief, however, doubt on this point cannot be effectually resolved at this time. The first meeting, on the 5th day of January, 1895, was adjourned to take the advice of the Attorney General touching the legality of their proposed assessment. This advice the Attorney General declined to give, because, it may be assumed, it was not within the scope of his official duty to do so. Further meeting of the board was delayed by the restraining order of January 19, issued simultaneously with the filing of the original bill, until after the 18th day of February, 1895, when the order was rescinded, with leave to renew it at a later stage in the proceedings for assessment as complainants might be advised, jurisdiction of the cause being for that purpose then and there retained (R., p. 18). It is worthy of note that no obstacle existed, at this stage in the proceedings, to the exercise by the appellants of their right to apply to the court for a construction of the sixth section of the act in question and its adjudication as to, first, the existence of and, secondly, the limitations upon their power to assess under its provisions. Had they seen fit to do this, can it be doubted that they would have invoked the same forum to which the appellees

had already applied and through the medium of a bill in equity? How else could they have proceeded in view of the purely common-law jurisdiction which is specially conferred upon the supreme court of the District of Columbia for the revision of the assessment provided for by the sixth section of the park act? There was surely nothing in the jurisdiction, thus specially conferred upon that court to act as a board of supervisors, which would justify it in passing upon either the validity or the sufficiency of the authority to assess which it is sought by the sixth section to impose upon the subordinate board of assessors. This would seem to have been the view which the latter took of the matter and which apparently influenced them to avail of the pending proceedings in order to secure a judicial construction of the power to assess. The excerpt from the proceedings at the meeting of February 21, 1895, admits of no other interpretation. The determinate and final designation therein made of the land of the appellees as the subject of assessment, coupled with the explicit declaration that such assessment was, then and there, made in order to conciliate doubts of the court's jurisdiction of the pending proceedings, operated as a complete waiver of unessential details in the process of levying the assessment and indicated their assent to the jurisdiction of the court in the pending proceedings.

It is not claimed, of course, that such assent would be competent to confer a jurisdiction which otherwise does not exist. The fact that it appears of record is only referred to for the purpose of emphasizing the contention that had the appellants, influenced by the motives which induced them to apply for advice to the Attorney General, desired to obtain a judicial interpretation of their power to make this assessment, they must have addressed themselves, through the medium of a bill, to the equity court, and that it is presumable they would have done so had not the pending proceedings afforded them a convenient channel for securing as defendants the instruction which they might otherwise

have sought as complainants. The reason for seeking such authoritative counsel would seem to have been cogent. Ever since the cost of the land taken for the park, including expenses, had been ascertained—provisionally in December, 1891, on the report of the appraisers, and finally in January, 1892, upon the ratification by the court of that report—and ever since the President's approval, on the 13th of April, 1892, of the values which had been fixed by the appraisers, the mandate to assess, as for benefits resulting from location and improvement of the park, had rested upon the appellants. The only purpose, however, to which the proceeds or avails of such special assessment could be applied under the park act was the payment to the owners for lands actually taken, not the repayment to somebody else of moneys which had been already applied to the purpose. Hence the proper time for assessing was, obviously, the time when the lands were taken and the cost ascertained—*i. e.*, not later than the summer of 1892. At that time, however, no possible benefits had resulted from the mere "taking" of the land for the Rock Creek park. The nature, form, and condition of the land remained as it had done during the previous century. It had undergone no physical change, whatever, and it will not be contended that the legal change involved in the transfer of title to the United States was a benefit, or, if a benefit, such a tangible one as would furnish criterion for assessment upon any known principle of the law of eminent domain. If no substantial benefit had resulted at that time from the *location* of the park, still less could any benefit have been predicated of its *improvement*, since no improvement had in fact been made. The landowners, however, were to be paid, and, until they should have been paid, the park could not be said to have been fully established. In this dilemma the appellants, at a single stroke, severed the Gordian knot. In the absence of all ground for special assessment they had recourse, in the first instance, to the $1,200,000 which had been appropriated by

the act for the purpose, apparently, of supplying such deficiencies as might have existed in the prescribed assessment. Whether they were strictly justified in doing this by a technical interpretation of the language of the act cannot now be a subject of inquiry. Certain it is that they felt compelled to do so in order to pay for the park, and that, in so doing, they tacitly, but no less emphatically, admitted their inability to conform to the assessment mandate of the sixth section. This mandate, however, made still more impossible of execution by the changed condition wrought by intervening years, remains to oppress them, and must continue to do so until they shall have been relieved by judicial fiat of the burden which it imposes. The question is therefore fairly presented, "How shall this relief be secured? Can it be done in the exercise of its general jurisdiction by a court of equity, or can it only be afforded by the limited judicial agency sought to be created by the sixth section of the act for the supervision of the proposed work of the appellants as a board of subordinate assessors? It would seem that the bare statement of the question carries with it its appropriate answer.

It is merely axiomatic to say that a court cannot be ousted of its jurisdiction save by the use of express and prohibiting terms. No such terms are used in the park act with reference to the equity court. It is no less axiomatic to affirm that such terms cannot be supplied by implication. When, therefore, the act confers upon the supreme court of the District of Columbia the power, after notice shall have been duly given, "to hear and determine all matters connected with said assessment," it is clearly the grant of a special jurisdiction in aid of its newly created and equally special supervising function over the proposed assessment, and is, in no sense, a limitation upon the subsisting general jurisdiction of that court or any of its branches. The specific scope and narrow bounds of this special jurisdiction, as well as its non-interference with the court's general jurisdiction, is

abundantly evident from the next succeeding clause: "and may revise, correct, amend and confirm said assessment in whole or in part, or order a new assessment in whole or in part, with or without further notice, or on such notice as it shall prescribe." In a word, the court is here created, *pro hac vice*, a supervising or appellate board of assessors with power "to regulate the assessment proceedings, to rectify errors, modify rulings, annul and order new assessments." Is there anything in this language to oust the equity court of its jurisdiction to grant preventive relief upon any one of the recognized grounds of its intervention? The objection to the jurisdiction based on this ground is effectually disposed of by the Court of Appeals, in the course of its opinion, at pages 48, 49 of the Record.

As indicated by that opinion, the like special jurisdiction over the proceedings for the acquisition of park lands was conferred upon the supreme court of the District of Columbia by the third section of the act. But this special grant in nowise interfered with the allowance of the writ of error to review the rulings of the court upon the application of Mr. Louis P. Shoemaker. There is even greater need of the right to invoke the general jurisdiction of the court in cases arising under the sixth section, since the latter undertakes to cut off, absolutely, the right of appeal from the special jurisdiction which it confers upon the supreme court of the District of Columbia by ordering that "the orders of the court shall be conclusive evidence of all previous proceedings necessary to the validity thereof, and the matters recited in said orders." The position taken by the majority of the Court of Appeals upon this point is amply sustained by the reasoning of the court in Ames *vs.* Kansas, 111 U. S., 468, where the doctrine upon the subject is laid down in the words of Chief Justice Taney in Gittings *vs.* Crawford, Taney's Dec., 1–9, as follows:

"Grant of jurisdiction over a certain subject-matter to one court does not of itself imply that jurisdiction is to be exclusive."

The Court of Appeals disposed no less effectively of the jurisdictional objection based upon the section 3224 of the Revised Statutes of the United States (R., p. 45). It is not believed that anything can be added to the cogency of the court's reasoning on those several points.

If, therefore, there be nothing in the special jurisdiction sought to be conferred by the act upon the supreme court of the District of Columbia in aid of its superadded function of revisory assessment to oust the general equitable jurisdiction of that court, and if the public policy designed to be subserved by section 3224 of the Revised Statutes is not in reality infringed by this proceeding, it remains to be considered under the head of jurisdiction whether the case presented by the appellees is such as to warrant the exercise, in their behalf, of the preventive agency of a court of equity.

To the convincing statement of principle and authority by the Court of Appeals at pages 46–49 of the Record but little remains to be added upon this subject.

The action of the managing commission between the filing of the original and of the supplemental bills would seem to have resolved effectually all doubt touching the appellee's claim to equitable relief. From the open threat to assess, generally, as for benefits the commission, in the interval between the filing of the two pleadings, proceeded to designate the specific land of the appellees as a particular subject of such assessment, and declared in a manner the most formal, public, and authoritative:

1st. That such land is actually benefited; and—

2d. That it is their fixed and determinate purpose, unless judicially restrained therefrom, to levy thereon and to collect an assessment as for such benefit—

And that this assessment shall be as for benefits resulting from the location *and improvement* of the Rock Creek park. (R., pp. 22, 36.)

It is true the final step in the *mere process* of assessing has

not been taken, but the no less determinate and conclusive act—the appropriation of the land by designation—has been performed. The cloud has been imposed. Unless dispelled by judicial intervention the lien will surely follow. It matters not how intangible the supposed benefit is nor how difficult it may be to reduce it to the prosaic standard of dollars and cents. Whether it consists, as in this case it is said to consist, of a prospect or view, or whether it consists, as it might consist, of a favorably disposed and enjoyable echo, the judgment of the appellants is conclusive and impositive of that degree of restriction upon the owners' right of property which, by the unanimous current of judicial decision, entitles him to the preventive agency of a court of equity. The purely æsthetical and sentimental consideration which gives value to a prospect of the sylvan beauties of the Rock Creek valley may be, and doubtless is, as little capable of exact estimation as would be the value of an echo that might prolong the dulcet melody of birds within the park. The fact, however, that such view or such echo has been declared, authoritatively, to be a benefit—a statutable benefit if you will—resulting from the location and improvement of the park, and that it is and will be the object of assessment and of levy unless judicial restraint be imposed, at this intervening step in the process, is, we submit, in the light of the authorities, ample ground for the interposition of this court.

Legal redress waits upon the stroke, but equity interposes to stay the descending blow.

That equity will prevent threatened invasion of property right in cases of waste, of trespass, and of nuisance, see—

Story's Eq. Jur., secs. 910–929.

Equity will enjoin collection of illegal tax.

Cummings *vs.* National Bank, 101 U. S., 153, 157, 158.

"Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

Union Pacific R. R. Co. *vs.* Cheyenne, 113 U. S., 516.

"And in such case of damage, either existing or apprehended, equity will interpose for relief even during the progress of the proceedings before sale."

Lyon *vs.* Alley, 130 U. S., 177, 187.

See also—

Gage *vs.* Kauffman, 133 U. S., 471.

Rich *vs.* Braxton, 158 U. S., 375, 407.

The Court of Appeals well says, in the light of these decisions:

"The removal of a cloud from the title to land is, therefore, a well-recognized ground of equity jurisdiction, when such cloud is the result of illegal taxation. The prevention of such a cloud is equally recognized. Prevention and removal are equally within the domain of the remedial processes of equity." (R., pp. 46–47.)

The language of the sixth section is:

"Deeds made to purchasers at sales for delinquent assessments hereunder shall be *prima facie* evidence of the right of the purchaser, and any one claiming under him, that the real estate was subject to assessment and directly benefited, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been given, that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally."

The Court, speaking by Mr. Justice Harlan, in Rich *vs.* Braxton, *supra*, says:

"Mr. Pomeroy in his treatise on Equity Jurisprudence * * * correctly says that equity will interpose when deeds, certificates, and other instruments given on sales for taxes are made by statute *prima facie* evidence of the reg-

ularity of proceedings connected with the assessments and sales (3 Pomeroy's Eq. Jur., sec. 1399, and note 1, p. 437, and authorities there cited), and this view is sustained by numerous adjudged cases."

Where public officers threaten to appropriate private property to a publi, use in violation of law, the person to whom injury is threatened may have an injunction to restrain the commission of such illegal act.

Smart *vs.* Hart, 75 Wis., 471 (1889).

Equity may enjoin *a proposed illegal assessment.*

Baldwin *vs.* ?hine, 84 Ky., 510.

The attention of the Court is particularly invited to this case.

Per Curiam: In De Witt *vs.* Van Schoyk *et al.*, 110 N. Y., 7, 11:

"Moreover, the acts of the defendant are in derogation of the plaintiff's title, and, being calculated to injure her in that respect, would sustain an injunction, though no damage had actually happened. To remove a cloud upon title is a well-recognized head of equity jurisdiction, and the court will in like manner interfere to restrain a defendant from proceeding in an illegal act which if completed will necessarily cast a cloud upon that title and naturally diminish its value."

To the same effect is the well-reasoned case of Oakley *vs.* Trustees of Williamsburg, 6 Paige Ch., 262. Decision by Gray, C. J.:

"If the court may, to prevent litigation, expense, and vexation, entertain jurisdiction to remove a cloud, no reason is perceived why it may not be exercised to prevent the creation of such a cloud."

Groves *vs.* Webber, 72 Ill., 606, 607.

The court say in Bishop *vs.* Moorman, 98 Ind., 1:

"Our decisions uniformly hold that a land-owner may restrain an officer from doing, under color of official authority, an act that may injure the market value of his title by clouding it. This principle has found most frequent application in the case of threatened sales for taxes."

A court of chancery will restrain by injunction a threatened levy of execution upon land which is not legally subject to such a levy, and thus prevent a cloud upon the title, without compelling the owner of the land to wait until the levy had been completed, and then admit himself to be disseised, in order to maintain a writ of entry.

O'Hare *vs.* Downing, 130 Mass., 16–19, citing Clouston *vs.* Shearer, 99 Mass., 209; Hinchley *vs.* Creany, 118 Mass., 595; Rossell *vs.* Deshon, 124 Mass., 342, and Tucker *vs.* Kenniston, 47 N. H., 267.

The Court's attention is especially invited to the last-cited case of Tucker *vs.* Kenniston, as being directly in point and thoroughly well reasoned.

In every instance where relief by injunction has been denied it will be found that plaintiff had not only an adequate legal remedy and presented no claim for equitable intervention, but sought to obstruct the State or municipality in the collection of the public revenue. This grave consideration of public policy is absent from this case. Here the fund sought to be collected could not be used, if collected, for revenue. It must be paid directly to the Treasurer of the United States and kept by him as a separate fund. The sole object for which so much as one cent of it could be expended under the act would be the purchase of lands which have already been paid for in the acquisition of the park. Not one mill could be appropriated towards the reimbursement of the United States for the $1,200,000 or such proportion of it as has been expended for the payment of land and

services, or for any other purpose whatever than the one named. So far, therefore, from any public policy being subserved by the collection of this impracticable tax, the Government is bound by every consideration of justice to the tax-payer to withhold its hand from such a useless appropriation of his property, and the Court is constrained by a like consideration to prevent such criminal perversion of the sovereign power of taxation. The subject is well discussed in this connection by the court in deciding Alexander *vs.* District of Columbia, 2 MacA., 562.

To these citations may be added the exhaustive opinion of the Court of Appeals, speaking through Mr. Justice Morris, at pages 40–58 of the Record.

II.

THE POWER TO ASSESS.

This is to be considered in reference—

First. To the validity of its alleged source—*i. e.*, the sixth section of the act of September 27, 1890.

Secondly. To the sufficiency of its supposed grant—*i. e.*, the language or terms of that section.

Thirdly. To the propriety of its proposed exercise—*i. e.*, after the interval that has elapsed since the cost of the land taken and expenses were ascertained, to wit, December 19, 1891.

For if the section of the act in question be not reconcilable equally with the spirit and letter of the Constitution,

Or, if, being constitutional, it fails to delegate, effectively and intelligently, the power to assess which is here claimed,

Or, if the power be valid in its inception and be appropriately imposed, but if the conditions for its present exercise do not exist,

It is confidently submitted that, on any of these hypotheses, the attempt of the appellants to further proceed with the assessment, as for benefit to the appellees' land, should be restrained and the decree of the Court of Appeals affirming the order of Mr. Justice Cox should be, in its turn, affirmed.

a.

As to the validity of the sixth section:

Power to legislate exclusively for the District of Columbia is conferred by the Constitution, article I, section 8, clause 17, upon Congress. The only express limitation upon its exercise in the case of private property is to be found in the fifth amendment in the words: "Nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

In its exercise Congress acts as the legislature of the Union.

Cohens *vs.* Va., 6 Wheat., 424.

It was held in Loughborough *vs.* Blake, 5 Wheat., 317, that this includes the power of taxation. It is well recognized that the Constitution affords the full measure of powers exercisable by the Government, and that congressional legislation can only be in effectuation of the powers thereby expressly granted or necessarily implied. Fundamental principles of justice, uniformity, and right reason are the tests of the validity of legislation in both instances. For example, it does not require constitutional prohibition to invalidate an act of Congress which on any pretext whatever would deprive one citizen of his property to enrich another nor which would charge the nation at large for the expense of maintaining a single individual nor a single individual with the burden of providing for the maintenance of an entire community. For the same reason it must be

violative of every canon of constitutional construction to claim that for the embellishment of any part of the District of Columbia and the enjoyment of a certain proportion of its inhabitants only, as for the erection of a market-house, theater, or circus, a direct tax should be levied in the only manner prescribed by the Constitution for levying such tax—*i. e.*, upon the States on a censual basis. As little will it consist with organic law that the people of the District of Columbia, or any proportionate part thereof, should be required to defray the cost of a work which is expressly declared to be perpetually dedicated to the use and enjoyment of the people of the United States.

And an act which undertakes to effect such a purpose by levying a tax exclusively upon a fractional part of the land within the District of Columbia violates the express provisions of article I, section 2, clause 3, of the Constitution, which prescribes that direct taxes shall be apportioned among the several States according to their respective numbers and prohibits, in section 9, clause 4, of the same article, their being levied in any other way.

In other words, the object of the proposed tax being in its essence and being, moreover, declared to be national, such tax, to be constitutional, must be levied upon the nation at large and upon the constitutional basis of censual apportionment. While the Congress, by virtue of its power of exclusive legislation, unquestionably taxes the people and the land of the District of Columbia, this can only be done, legitimately, within the limitations imposed by the subjects and the objects of municipal administration, save only when, in aid of a national purpose, it becomes necessary to include the property within the District of Columbia within the purview of direct taxation based upon the entire representative population of the States, Territories, and the District, as exhibited by the last preceding census.

If the validity of the sixth section be doubtful, it is because the land of individuals within a limited area in proximity

to a national park—*i. e.*, within a radius of one-quarter of a mile in every direction therefrom—is thereby subjected to the possible burden of its entire cost. Herein the case differs essentially from that of The County of Mobile *vs.* Kimball, 102 U. S., 703, and like cases, where the inhabitants of a subordinate division and political agency of a State have been made to respond to a bonded indebtedness imposed to defray the cost of a work of prime utility which, besides being especially beneficial to themselves, is measurably so to the State at large. Herein, also, this legislation differs from all other legislation on the subject of taxation, whether State or Federal, that has preceded it, including the highway act which was lately the subject of the Court's adjudication in Bauman *vs.* Ross, 167 U. S., 548, for it is to be noted that the object here is general and, in a national sense, public, not special, and, in a modified sense, local; that it is imposed upon, not solicited, by the people, who are called upon to pay for it; that it is ornamental and not, in the economic sense of the term, useful, and that it invests those who are taxed for it with no title to the park nor right to any exceptional easement therein or thereover. It is observable, too, that the Court, in animadverting upon the State legislation in Mobile *vs.* Kimball, was evidently impressed by the harshness and apparent inequality of the burden thereby imposed upon the tax-payers of Mobile county, who possess, however, as the Court does not fail to remark, a potential form of redress (denied to the less favored residents of the District of Columbia) in the exercise of the corrective right of suffrage. This case cannot, however, be cited as authority upon this point, since the question as there raised was not a Federal one, but related, solely, to the conformity of State legislation with the constitution of Alabama.

But, as I have said, the objection here urged and fully sanctioned by the declaration contained in the first section of the act is broader than that which was advanced for the first time and extra-jurisdictionally in this Court in Mobile

vs. Kimball, and justifies the energetic language of Judge Cooley in his work on Taxation, at pp. 143, 144:

"If a single locality were to assume to tax itself or the State were to undertake to tax it for the construction of a State work or the erection of a State building, no one could hesitate for a moment in saying there was no such right, and that there could be none so long as taxation by the fundamental law is required to be laid by fixed rules and is not subject to the arbitrary caprice of legislative bodies. A county has, therefore, no constitutional authority to lay tax for a county building on a part of its towns only; neither has it authority, when it has contracted a debt for a county purpose, to levy a tax for the satisfaction of the debt on such parts of the towns only as its governing board may think ought in equity to pay it. The rule would be the same if a tax were levied for proper local purposes and the corporation were then to undertake or the State were to require its application to purposes not purely local."

Just previously, page 4, the same learned commentator, in reference to this subject, says:

"The Federal Constitution recognized this principle in the provision it makes to prevent the Federal Government from indirectly imposing its support upon one or more of the States to the relief of others."

Art. I, sec. 8, clause 1; sec. 9, clauses 4 and 5.
See, also, Sharswood, J., in Hammett *vs.* Philadelphia, 65 Pa. St., 146, 151.
People *vs.* Detroit, 28 Mich., 228.

To the same effect are People *vs.* Parks, 58 Col., 624; State *vs.* Leffingwell, 54 Mo., 458; Bromley *vs.* Reynolds, 2 Utah, 525; *In re* Washington Avenue, 69 Pa. St., 352, approving Hammett *vs.* Philadelphia, 65 Pa. St.

Redfield, J., in Allen *vs.* Drew, 44 Vt., 174–188, uses the following language:

"We have no doubt that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common bur-

den and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name."

Equally emphatic is the language of the court in Louisville *vs.* Rolling Mill Co., 3 Bush, 416.

The closest analogy that I have been able to find to the legislation under consideration is that which formed the subject of controversy in The State *vs.* Leffingwell, 54 Mo., 457, from which I quote as follows:

"But there is another point which remains to be noticed. By the law the park is set apart for the free use and enjoyment of the public forever, and it is declared to be of great importance to the city of St. Louis, conducive alike to the dignity and character of the city and the recreation, health, and enjoyment of its inhabitants, yet, strange as it may appear, neither the people themselves nor the inhabitants of the city of St. Louis, for whose especial benefit it is created, are taxed one cent for its establishment, but the exclusive privilege of paying nearly one and a quarter millions of dollars is cast upon a few citizens who are inhabitants of the district. *Nothing is better settled than that special taxation for objects that are general and public is illegal.* In the case of Wells *vs.* The City of Weston (22 Mo., 384) it was decided that the legislature could not authorize a municipal corporation to tax, for its own local support, lands lying beyond the corporation limits."

"Admit this principle" (that people outside the city for which a park is created may be specially taxed to make the said park) "and it would be perfectly competent for the legislature to pass a special act authorizing the building a court-house for the use of the whole county and assessing the cost of construction against the few individuals who own property immediately surrounding the court-house square. Thus we have the broad pretension set up of justifying a special taxation for objects which are avowed to be general and not local. Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits. Uphold this law and the time will probably come when it will be deemed advisable to provide statuary and other costly adornments for the park. There

is left nothing to hinder their being provided for in the same way. The legislature has no power to take the money of one man and transmit it to another, nor can it select a particular township and say that it shall pay all the taxes for the county, nor take a county and make it assume the taxes for the whole State; yet that is precisely the principle that must be established to sustain this act."

Since the decision by the Court of Appeals this Court has decided Bauman *vs.* Ross, wherein one of the contentions was that in view of the magnitude of the scheme of improvement therein involved the attempt to enforce its payment by special assessment was an invalid exercise of legislative power. The difference between the two cases is, however, essential and must be obvious. The improvement there contemplated was exclusively local in its character and impositive of direct local benefit. Here the work is just as essentially national, and so declared to be, and the resulting benefits are obviously indirect, public, and relative, and in no degree direct, local, and positive.

The view entertained upon this point by the learned judge who heard the case at special term is set forth with his accustomed force and clearness in the latter part of his opinion at pages 31, 32 of the Record. He demonstrates therein the consistency of the court's dictum in the case of County of Mobile *vs.* Kimball, 102 U. S., 691, with the doctrine for which we here contend, viz., that while a subordinate community in a State, such as a county, may be required to defray the expense of an improvement which, besides being peculiarly beneficial to itself, is largely so to the entire State, it would contravene the spirit, if not the letter, of constitutional guaranty to subject a restricted area (*i. e.*, abutting lands) or a limited number of individuals to a similarly exclusive burden or charge.

On the hearing of the cause below it was urged on behalf of appellants, and it will doubtless be again urged here, that

the validity of the sixth section of the act was affirmed by this Court in Shoemaker *vs.* U. S., 147 U. S., 282.

If this contention be correct, then the validity of the sixth section is no longer an open question, and was not an open question at the date of the successive decrees by the supreme court of the District of Columbia and by the Court of Appeals of the District of Columbia. Those decrees were based, however, upon other conclusions than that involving the validity of this section and upon conclusions which were equally determinative of the rights in controversy—*ex. gr.*, that the section in question is impossible of execution; that the assessment is incapable of levy; that the time has passed for making it; that the occasion for making it has been superseded by payment already made for lands taken, etc., no one of which affords the essential basis for the exercise of its appellate jurisdiction by this Court in the absence of any dispute involving the sum of $5,000 or upward, as required by the eighth section of the act of Congress of February 9, 1893, establishing the Court of Appeals of the District of Columbia.

It follows, therefore, that, if the position of the appellants be well taken, the appellate jurisdiction of the Court has been erroneously invoked by them, and the appeal should be dismissed.

b.

As to the sufficiency of the grant of the power to assess:

This is determinable upon (1) the interpretation and (2) the construction of the sixth section of the act.

The act exhibits the attempted exercise of two distinct and sovereign powers, as, first, of the eminent domain (secs. 1–5), and, secondly, of taxation under the guise of benefit assessments (sec. 6). By virtue of the former the park has been established. It is now sought to *duplicate its payment* by the latter.

In the first section Congress indicates the purpose of the act to be the establishing of a public park or pleasure ground for the benefit and enjoyment of the people of the United States, the extent whereof shall not exceed 2,000 acres, nor the cost the amount thereinafter appropriated.

The sixth section provides that "the commission (appellants), having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expense upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate;" and, further—

"If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited as they shall deem the said real estate specially benefited."

The following analysis of the sixth section will serve to show the impracticable character of the duties which are thereby assigned to the appellants and the consequently ineffectual nature of such assessment as they might seek to impose by virtue thereof.

The analysis naturally respects—

1. The time when the assessment shall be made.
2. Its purpose.
3. Its objects.
4. Its subjects.
5. Its procedure.
6. Its scope and effect.

The time of assessment is made to coincide with the ascertainment by the commission of "the cost of the land, including expenses." It is conceded by the answer that the cost of all land, purchased as well as condemned, was ascer-

tained upon the return to the court of the appraisers' report on the 19th day of December, 1891, and it is matter of proper assumption that the expenses, being the subject of ready computation by the commission themselves, must have been ascertainable, if not ascertained, at that time.

The purpose of the assessment is declared to be, alternatively, either the discharge or satisfaction of an undesignated "proportion of *such* cost and expenses" or "the full extent of the *estimated* cost and expenses."

The indicated objects are benefits resulting by reason of the location and improvement of the park to the following enumerated subjects, viz., "lands, lots, and blocks situated in the District of Columbia."

The prescribed procedure contemplates application to the supreme court of the District of Columbia for confirmation and consequent lien; the division of the assessment, when confirmed, into four parts, payable annually, with interest; the payment thereof to the Treasurer of the United States and its custody by him as a separate fund; the conclusive effect of the court's order upon the regularity of the assessment and the *prima facie* evidence of facts set out in the assessment book; the collection of delinquent assessments by the officer having such matters in charge on receipt of assessment book; the payment of "all moneys so collected" by the treasurer on order of the commission, *as compensation for land or services;* the possible assessment and collection of $10,000 in excess of the cost of lands, including expenses, and its use in the improvement of the park under direction of officers named in section 8, there being no such section in the act; the ratable refunding of any excess of assessment over the excess of $10,000 (to whom, when, or how not mentioned); the allowance to public officers performing duties thereunder of such fees and compensation as they would be entitled to in like (?) cases of collecting taxes; the making of deeds which might be given pursuant to sales for default in the payment of such assessment *prima facie*

evidence of recited facts, and according to judgments for sale of any real estate for unpaid assessments, conclusive evidence of regularity, there being no jurisdiction in the court for the rendition of such judgments.

From the foregoing it would appear that the scope of the proposed assessment was designed to be coextensive with the limits of the District of Columbia, and its effect to create a lien upon the lands, lots, and blocks situated in said District whereon it might be imposed.

If tested by the recognized canons of interpretation on the one hand and of construction on the other, the power here sought to be conferred is found to be incapable of execution, the resulting attempt at assessing, no less than the threatened levy, must prove ineffectual. The power to assess, as well as the limitation upon it, and the manner of its exercise are, as we have seen, indicated by the first and second clauses of the sixth section. It is upon the just interpretation and reasonable construction of these two clauses that the ~~valid-~~ sufficiency ity, no less than the existence, of this power depends. The power itself, being in derogation of common right, must not only be indicated, but it must be conferred in terms which leave its execution free of all rational doubt and which bring its operation clearly within the pale of legal requirement. No intendment should be evoked to supply the defective expression of legislative intent in a taxing measure such as this. The sanctity of private property prohibits the exercise of judicial astuteness in aid of public spoliation.

"I cannot speculate as to the intentions of the legislature in the presence of words which appear to me to be quite plain."

Samuel *vs.* Nettleship, 2 Q. B. Rep., 188.

"It has been hitherto propounded that words are to be taken in their ordinary sense; it now requires to be added, and not to be extended beyond it, to comprehend a case within the supposed meaning of the legislature."

Potter's Dwarris, p. 203.

"They," *i. e.*, the judges, "are not (as the most learned members of a learned body must know) to *presume* the intentions of the legislature, but to *collect them* from the words of the act of Parliament; and they have nothing to do with the policy of the law. This is the true sense in which it is so often impressively repeated, that judges are not to construe statutes by equity or views of policy, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness."

Ibid, p. 204.

Courts cannot supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments.

27 Me., 285.

A *casus omissus* in a statute cannot be supplied by judicial interpretation.

4 Gilman, 208; 14 Johnson, 479; 15 Me., 167; 6 Pickering, 362; Peter's Con. R., 669; 6 Mo., 257; 7 Wend., 241; 2 Binney, 279; 8 Johnson, 322.

Where rights are infringed, fundamental principles overthrown, and the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design on the part of the legislature to effect such objects.

1 Peter's Cond. R., 425.

Statutes are never to be construed so as to work injustice.

7 Johnson, 495, 496.

NOTE.—The fund to be realized by the assessment is to be kept separate and *may* be paid out by the Treasurer for lands taken.

"The word 'may' is imperative where the rights and interests of the public are concerned or where the public or

third persons have a claim *de jure* that the power shall be exercised or the duty performed."

4 Gilman, 20; 5 Cowen, 195; 14 S. & R., 129; 1 Eng. Com. Law, 46; 1 Peters, 46; Saunders, 58, Note 2; 2 Salkeld, 609; Croke, Elizabeth, 655; Croke, Jac., 134.

Where a statute makes no exceptions, courts can make none.

25 Miss., 571.

The rules for the construction of statutes are the same at law and in equity.

Peter's C. C. Rep., 188.

A statute shall never have an equitable construction to overthrow an estate.

Dwarris, 729.

Where a statute requires a thing to be done in a particular way, that way alone must be pursued.

3 Brevard, 306.

A statutory power, derogatory to private property, ought to be construed strictly, and not enlarged by intendment.

Dwarris, 750.

Statutes which are in derogation of the common law and which have the effect to divest or affect the title to real estate are to be strictly construed.

2 Mich., 486; 4 Hill, 776.

Applying the foregoing canons of interpretation to the clauses of the act in question, it is easy to perceive wherein the power of benefit assessment thereby sought to be conferred is absolutely incapable of execution. This is observable—

1. In respect of the measure of proposed assessment or the rule by which it shall be apportioned—*ex. gr.*, "The com-

mission, having ascertained the cost of the land, including expenses, shall assess *such* proportion of such cost and expenses upon the lands," etc. The act will be searched in vain for the absolutely essential noun which the adverb "such," in order to be sensible, must here qualify. This is no merely grammatical criticism. It is necessary to the lawful discharge of this sovereign function that the limitation upon its operation should be legislatively and distinctly defined. Coupled with the command to assess must ever be the indispensable restriction upon the amount of the assessment and prescription of the rule by which it shall be apportioned. The purpose is plain to make special benefits a total or partial compensation for the cost and expenses of location and improvement; but to what extent or in what proportion is left wholly unexpressed in this first clause of the sixth section.

As was justly observed by Mr. Justice Cox upon this point:

"If the court were asked to direct the commission by mandamus to discharge the duty devolved upon them by this clause, what direction could the court give? What proportion could it direct the commission to assess upon the property? It seems evident that the clause is too uncertain to be executed, either voluntarily by the commission or under compulsion from the court, and they must be held to derive no authority to act under that clause."

If the first clause is inoperative, the second is not less so. The failure of the one to fix the essential bound to assessment is not supplied by the indeterminate suggestion in the other that if actual benefit shall not be found commensurate with "the estimated cost and expenses" the commission shall proceed to assess at discretion. By every recognized canon of construction, the purposes of the two clauses being to confer one and the same power upon one and the same agent, the clauses must stand or fall together. If the one be vague and the other indeterminate, and, *a fortiori*, if they

be repugnant one to the other, neither can be operative, and the authority sought to be conferred is abortive.

This we have shown to be the case in respect of the measure of the assessment. It is no less observable—

2. In respect of the objects of the assessment—*i. e.*, benefits.

Whether these are to be regarded as relative or absolute it is not easy to gather from the language of the first clause. Upon this point we venture to adopt once more the concise reasoning of the learned judge who presided at special term.

"It will be observed that the second clause provides for the contingency that real estate in the District of Columbia is not benefited to the full extent of the estimated cost and expenses; and it might hence be inferred that the first clause was intended to provide for the contingency that the benefits did extend to the whole amount of the cost and expenses, and that the first clause was intended to direct the whole of that cost to be assessed upon the several tracts, lots, or blocks of land situated in the District of Columbia in proportion to the benefits resulting to them respectively.

"But the language of the first clause is absolute and unconditional. 'The commission *shall assess*' is the language. The question is, What shall they assess? Can it mean that they shall assess the whole cost, apportioning it among the several tracts with reference to their *relative* benefits and without reference to their *actual* benefits? If so, it would, in the first place, be plainly unconstitutional, because it would make the several tracts pay for benefits they never received, and, in the next place, it would be in conflict with the second clause, which limits the assessments to the extent of the actual special benefits. Can the first clause mean that there shall be assessed upon the several tracts just such proportion *or portion* of the entire cost as the actual pecuniary benefit to them will amount to? If so, what was the use of the second clause? for that is just what that was intended to express. But even here, again, there would be a contradiction between the first and second clauses, for one directs the assessment to be made with reference to the *location and improvement* of the park and the other with reference to the *location* only. We must assume that Congress did not in-

tend to direct the same thing to be assessed by two different clauses, and still less to direct it to be done in two different ways.

"Bearing this in mind, when we examine the first clause we find that it has an uncompleted direction, making it entirely meaningless. It directs, not that the whole cost shall be assessed, but that '*such proportion*' of cost and expenses shall be assessed. What that proportion is is not stated. Instead of saying, 'Such proportion as may be determined by the commission' or as may be determined by one or other of certain considerations, the sentence is left incomplete and directs simply the assessment of 'such proportion,' without in any otherwise defining the proportion."

The difficulty, nay, the impossibility, of executing the law in question is again observable—

3. In respect of the standard of proposed assessment.

By the first of the clauses above quoted the commissioners are required to assess "such proportion of such cost and expenses upon the lands, etc., especially benefited by reason of the *location and improvement* of said park." The claim was made below in argument that the standard thus emphatically established by the first clause is limited by the second to "the location of the park," and that the words "and improvement" should be regarded as surplusage. Aside from the rule of construction which enjoins that legal intendment cannot be substituted for legal expression and, *a fortiori*, shall not override legal expression in a statute derogatory of common right, the appellees, in making this contention, are opposed by their own interpretation of the act according to which they have declared it to be their purpose to assess benefits as for the improvement no less than for the location of the park. (R., p. 7.)

"No system of improvement," says the learned judge in deciding the case at special term, "has been adopted; no money has been appropriated for the purpose of making improvements and no one knows that any ever will be appropriated. The only standard which the commissioners

would have for estimating benefits with reference to improvements would be found in their imagination as to what may be done at some indefinite time in the future. It is impossible that a just appraisement of benefits could be made on that basis. Here also, if the court were to attempt to enforce the duty charged upon the commissioners, it would find it equally impossible with such proceeding under the first clause, as already suggested."

The sole authority for making this assessment is to be found in the section of the statute under consideration. The terms by which that authority is sought to be conferred are, as we have seen, hopelessly obscure and fatally repugnant. The power itself is therefore, we submit, plainly incapable of execution.

The supreme court of New Jersey, in the case of The State *vs.* Hudson County Avenue Commissioners, 37 N. J. L., 12, were confronted with legislation in no degree more uncertain and contradictory than the act of Congress in question, and the observations of Chief Justice Beasley in adjudging the act to be invalid because incapable of execution may be well adopted in aid of the appellees' contention here.

The court in that case say:

"A legislative act of taxation, in order to be legal and effectual, must consist of something more than a mere declaration that a certain sum of money shall be raised out of the property within a county. Itself must distribute the burden. This is as essential as the designation of the amount to be raised; and not only the sum required must be stated and the property out of which it is to be made designated, but also some *certain standard of assessment must be established. No act of taxation can omit any of these components.*"

Certainty is of the essence of taxation. He who is to bear the burden has a right to know not only its purpose, but its limitation and the standard by which it is to be imposed, otherwise he must be at the absolute mercy of the impositor of the charge.

c.

As to the propriety of making the proposed assessment at this time:

Nothing, perhaps, demonstrates more conclusively the invalidity of the proposed assessment than the attempt to make it after the interval which has elapsed since the report of the commissioners of condemnation on the 19th of December, 1891, and its subsequent final approval by the court.

The appropriate time for assessing—*i. e.*, the only period at which assessment as for benefits could have been legally made, if at all—is established by the first clause of the sixth section in the only language therein used which is absolutely free of doubt.

The wording is "that the commission, having ascertained the cost of the land, including expenses, shall assess," etc.—that is to say, when or as soon as the commission shall have ascertained the cost, etc., they shall assess; not that "having ascertained," etc., they shall, at some future time, assess. The obvious purport of the words is that the work of assessment shall be coincident with or follow at once upon the process of condemnation. This is made evident by the subsequent provision for payment of the constitutional "just compensation" to land-owners out of the prescribed assessment. "All money so collected," says the act, "may be paid by the treasurer on the order of the commission to any persons entitled thereto as compensation for land or services." It is an axiomatic principle of constitutional law that the act of compensation shall be performed coincidently with the acquisition. The hand which seizes shall be the hand that pays. The citizen who is subjected to extraordinary burden shall, at least, be treated with ordinary justice. To postpone the time of compensation is to superadd a penalty on the land-owner's dispossession,

hence the court in Isam *vs.* The Mississippi Central R. R. Co., 36 Miss., 300, well said upon this point:

"To say that the owner shall be paid at any other time or in anything else than the measure of value known to the Constitution, or that he shall receive more or less than the loss of injury *then* capable of definite inquiry and ascertainment, or that his claim to this compensation shall be extinguished by the probable benefits which in the future may result from the construction of a road which may not be finished in sixteen years (the time limited by the charter) cannot, by any fair interpretation of the Constitution, be regarded as just compensation first made."

The fact that assessment is directed to be made as for benefits resulting from the location and improvement of the park does not justify the attempt to assess at this time. There are two objections, either of which is fatal to such attempt.

The one is that the assessment was intended to afford, at least in part, the means of compensation for land taken, and the payment of this compensation, we have seen, could not legally have been postponed beyond the period of acquisition.

The other is that it is a fact—undenied and undeniable—that no improvement whatever has been made of the park.

The Court declared in the District of Columbia *vs.* Prospect Hill Cemetery:

"Most extraordinary and unjustifiable would it be to levy such assessments before the proposed improvement was even begun."

If, again, the act be appealed to for the purpose of exhibiting a legislative intent to postpone, in fact, the payment of compensation in that clause of the sixth section which provides that—

"The assessment, when confirmed, shall be divided into four equal installments, and may be paid by any party in-

terested in full or in one, two, three, or four years, on or before which time all shall be payable, with 6 per centum annual interest on all deferred payments"——

—we have only to observe that it is no more competent for a court to sanction the expressed intention to violate legal requirement than it would be to connive at the implied purpose to do so.

It is perfectly plain that it was the purpose of the framers of the measure to provide, *primarily*, for the payment of lands taken by the transmuted value of supposed benefits to other lands in the District of Columbia not taken. Their estimate of these supposititious benefits enlarged, apparently, with the progress which they made in constructing the act; for while there is evidence in the phraseology of the first two clauses of the sixth section that their expectation on this point was confined to the modest limit of actual cost and expenditure, and possibly fell short of that limit, they had not reached the latter half of the section before their expanding confidence betrayed them into expressing the belief that the value of those benefits would exceed such cost and expenditure by more than ten thousand dollars!

Had this belief been well founded the objection must still have obtained that a compensation thus remitted to future and intermittent creation, based upon uncertain, arbitrary, and capricious standards of ascertainment and payable at no fixed period, was far short of being just, and therefore constitutional.

The act provides two funds for the attainment of the same object—*i. e.*, acquisition of lands for Rock Creek park. The one is by the assessment for benefits, and may be termed potential. The other is by the appropriation of $1,200,000, and may be termed actual. Neither is related to the other in terms or by necessary or remote implication. The one might be the alternation of the other, but the most ingenious interpretation that could be devised would fail to

disclose ground for holding that the expenditure of the one could by any possibility be supplied or reimbursed by collection of the other. It was practicable to have defrayed the cost of the land by assessment based upon proper estimates as the work of acquisition progressed or immediately upon its consummation. In that event or in any event the assessment must have been limited strictly to the cost of the park, and could not have included its improvement. (Cooley on Tax., 664; Minn. Linseed Oil Co. *vs.* Palmer, 20 Minn., 468; Schenely *vs.* Commonwealth, 36 Pa. St., 9; Chamberlain *vs.* Cleveland, 34 Ohio St., 551; Hanscomb *vs.* Omaha, 11 Neb., 37; Dashiell *vs.* Balto., 45 Md., 615.)

Upon this point the learned judge who tried the case at special term uses the following apposite language (the italics are our own):

"There is a further difference to be noted between the two classes. The assessment under the first clause was to be made with reference to the benefits resulting from both the *location and improvement.* In the second clause each tract is to be assessed to the extent of the benefits derived only from the *location* of the park. *At the present time* it is quite plain that no benefits are derived *from the location*, because the adjacent owners of property *have nothing which they had not before.* For this reason it appears that the commission have declared their intention of assessing with reference to both location and improvement. Their whole authority is derived under this second clause, and that does not authorize them to assess with reference to both *location and improvement*, and so far their proposed assessment is, therefore, without authority of law.

"But if it could be held to authorize such proposed assessment, the standard by which they are to be guided is so uncertain as to make the execution of the law as impossible under this as under the former clause. When a street is, by municipal ordinance, directed to be opened, graded, paved, or otherwise improved, we all know exactly what is to be done and what the effect will be upon adjacent property; but there is no law providing for the improvement of the park." * * * "I think, therefore, that the assess-

ment proposed to be made by the Commissioners is not authorized by the statute, and, as it would create a charge upon the record on the property of the complainants, it ought to be enjoined."

But the land has been already fully paid for by the expenditure of so much of the $1,200,000 actually appropriated for the purpose as was necessary, and the one-half of this sum is being reimbursed to the United States by the tax-payers of the District. There is therefore no purpose to which the fund, potentially created by assessment, can be applied.

Can there be a more palpable instance of ineffectual taxation?

We have shown that the proposed assessment in order to be legal would have to be limited to the cost of the park, including, possibly, incidental expenses; but the act provides for the levy and collection of an assessment which, in terms, may include more than the cost and expense of acquiring the park and extend $10,000 towards its improvement. For this there is no shadow of legal justification, and the exercise of the taxing power thus exhibited is so unreasonable, tyrannical, and unjust that it must shock the conscience and appeal in vain to the coercive agency of the Court. Fortunately, however, the framers of the act have overreached themselves, and the act in this particular becomes incapable of execution by reason of the failure to provide the necessary agents for its enforcement. The only officers who are charged with the administration of the potential fund for this purpose are such as are included in an impossible section of the act (section 8), and are, therefore, not only non-existent, but are incapable of being supplied.

The office of interpretation is to bring a sense out of the words and not to bring a sense into them. The spirit of the law may be referred to in order to interpret words ad-

mitting of two meanings, but never to extend a law to a case not within its fair meanings.

Beebe *vs.* Griff, 14 N. Y., 244.

McClusky *vs.* Crummell, 11 N. Y., 593.

In dealing with this feature of the case Mr. Justice Cox observes:

"The act then appropriates two distinct funds to the payment for these lands—first, what should be collected from assessments, and, next, from the general unappropriated money in the Treasury. These two features of the law can only be reconciled by assuming that the proceeds of the assessments, so far as they would go, *were to be applied first and only so much as might be necessary in addition thereto out of the general fund in the Treasury.*

"All this strongly implies that the assessment should be made immediately after the valuation in order to ascertain how much should be paid from the Treasury at large, the assessment being directed to be kept by the Treasurer as a separate fund to be applied to this object. It was therefore evidently not intended that the money should first be paid out of the Treasury of the United States and then afterwards they should make the assessment. Particularly cannot that be the case under existing circumstances. The law requires that the District of Columbia should reimburse the Treasury of the United States one-half of the amount paid out of the Treasury in four equal annual installments. That reimbursement, so far as the time which has since elapsed has allowed, it is understood, has been made by the District. If the assessments for benefits can be made now, it is the duty of the party assessed to pay the whole amount into the Treasury of the United States, and the effect will be as to one-half of the amount the Government will be paid twice—that is, it has already received payment from the District of Columbia, and would receive payment again from the parties assessed. The commission has no authority to apportion this assessment between the District and the Government.

* * * "The Commissioners, as I understand, drew orders upon the Treasury in favor of the parties entitled to

compensation for their land, and they were paid by the Treasury on those orders as vouchers. The law really only authorized the Commissioners to draw upon the money collected from assessments. Perhaps by fair implication they were authorized also to draw so much as the assessments failed to satisfy of the demands of the land-owners; *but the effect of their drawing upon the Treasury for the whole amount due for the land was a virtual ascertainment by them that there were no benefits to be assessed, because they had no authority otherwise to draw upon the Treasury for the whole compensation due to the owners.*"

The court of Appeals (pp. 54-55) adopt Mr. Bacon's interpretation of the section in 43 ch. 113, as an independent ground of their decision.

Whether the constitutionality of the sixth section is or is not open for adjudication, it is respectfully submitted that such adjudication is not now and has not been essential to the relief which is sought by the original and supplemental bills of complaint. On the contrary, the record discloses that the averments of these several pleadings exhibit other and equally broad grounds for the successive decrees of the two lower courts, and that those decrees, in turn, were expressly based as well upon a judicial interpretation of the sixth section and consequent ascertainment of the impossibility of executing the power of assessment therein sought to be conferred; the efflux of time since it was authorized to be made; the intervening payment in full for all lands taken; the absence of all authority for reimbursing for such payment, in whole or in part, from the proceeds of such assessment, in short, the present impossibility of exercising the authority to assess which devolves upon the appellants, and the like non-constitutional grounds, as upon the invalidity of the sixth section. No jurisdictional amount or value is in controversy, and it would seem to be matter of grave doubt, as the case is here presented, whether the appellate jurisdiction of the court attaches by virtue of the eighth section of the act of February 9, 1893, establishing a Court of Appeals for the District of Columbia (27 St., 434), in the

light of the subjoined adjudications (among others) by this Court:

Williams *vs.* Oliver, 12 H., 124; R. R. Co. *vs.* R. R. Co., 14 Wall., 636; Murdock *vs.* Memphis, 20 H., 636; Jenkins *vs.* Loenthal, 110 U. S., 222; R. R. Co. *vs.* Swann, 111 *Id.*, 379; King Bridge Co. *vs.* Otoe, 120 *Id.*, 225; De Saussure *vs.* Gaillard, 127 *Id.*, 216, 232–'4; Tucker and Gould, Notes on Rev. St., 178.

In conclusion, I beg leave to repeat:

1. The measure or proportion of the proposed assessment, no less than the standard by which it is to be made, are hopelessly indeterminate and incapable of intelligent ascertainment.

2. In order to conform to statutory requirement, the assessment must have been based upon estimates of cost and expenses made concurrently with the acquisition of the land and in payment of the just compensation therefor.

3. The mandate being to assess for the cost and expenses of location and improvement of the park, it becomes incapable of execution in presence of the admitted fact that no improvement, whatever, has, in fact, been made.

4. In the absence of any just criterion for determining the proportion of cost and expense for which the land specially benefited shall be assessed and of the definite standard by which such assessment shall be made, it is obvious that no such assessment can be legally imposed by the appellants, either voluntarily or under the compulsion of judicial process.

5. Without resorting to this assessment, the land composing the Rock Creek park has been already fully paid for out of the general appropriation made for that purpose

by the act, the one-half of which general appropriation is now being repaid to the United States, by general taxation of real estate within the District of Columbia, so that the purpose of such assessment has been anticipated and the occasion for making it no longer exists, and the making thereof, at this time, would result in the possible payment to the United States of $600,000 over and above the amount actually expended by them in the acquisition of a public park to which neither the District of Columbia nor its citizens have any scintilla of title.

6. The sixth section of the act is obnoxious to the grave objection that it imposes upon a restricted area of abutting real estate and a comparatively few individuals the burden of the cost and expense of acquiring land for a public park perpetually dedicated to the use and enjoyment of the people of the United States, wherein the citizen sought to be assessed enjoys no exceptional easement, which he has never solicited and to which he can acquire no title.

7. Local assessment can only be legitimate when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed and to the extent of those benefits.

8. They cannot be imposed when the improvement is either expressed or appears to be for general public benefit; and

9. The period imperatively assigned by the act for making the proposed assessment ceased to exist with the report of the commissioners of appraisement, on the 19th of December, 1891, and the subsequent ratification of that report by the court, and there is absolutely no authority for assessing at this time, after the park has been fully paid for and the conditions no longer exist which alone would have justified the imposition of the proposed assessment.

10. The record discloses that the relief which is sought by the original and supplemental bills of complaint is not made thereby to depend exclusively upon the validity of the sixth section of the act in question, but that it is founded upon other and equally substantial grounds, no one of which is qualified to sustain the appellate jurisdiction of this Court, but any one of which is broad enough to support the decree from which this appeal was taken, and that such decree was actually based as well upon such sufficient and non-constitutional questions.

It is therefore respectfully submitted that the appeal should be dismissed or the decree of the Court of Appeals of the District of Columbia should be affirmed.

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Of Counsel.